

Before the
Federal Communications Commission
Washington, D.C. 20554

JAN - 7 1999

In the Matter of)
)
Amendment of Section 73.202(b)) MM Docket No. 98-155
(Table of Allotments)) RM-9082
FM Broadcast Stations) RM-9133
Alva, Mooreland, Tishomingo,)
Tuttle, and Woodward, Oklahoma)

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

REPLY TO OPPOSITION

Ralph Tyler (hereafter Tyler), licensee of Station KTSH(FM), Tishomingo, Oklahoma, by his attorneys, and pursuant to Section 1.45(b) of the Rules, hereby replies to the Opposition to Motion to Accept Response and Response of Ralph Tyler, filed December 23, 1998 by Chisholm Trail Broadcasting Co., Inc. (hereafter Chisholm Trail), licensee of Station KXLS(FM), Alva, Oklahoma. In support thereof, Tyler respectfully states as follows:

1. Chisholm Trail urges inter alia that Tyler's Motion to Accept Response and Tyler's accompanying Response should be summarily dismissed because the Motion does not contain any "good cause" showing concerning why the Response should be considered

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by the Commission (Chisholm Trail Opposition, p. 2). Chisholm Trail's assertion is frivolous.

2. Tyler's Motion refers to Tyler's Response which sets forth in detail why each of Chisholm Trail's Reply Comments, its Supplement to Reply Comments and its Opposition to Statement for the Record are procedurally defective. Tyler's Response also demonstrates that Chisholm Trail's Supplement to Reply and its Opposition to Statement for the Record should be summarily dismissed or returned without consideration by the Commission because these pleadings contain "scandalous" matter within the meaning of Section 1.52 of the Rules. In any event, Chisholm Trail goes on to urge the Commission to accept and consider the declarations attached to Tyler's Response (Ibid.) and thereby effectively contradicts its own argument that Tyler's Response should not be considered on its merits.

3. Chisholm Trail argues that its dilatory conduct in pleading its case should be excused because the "Commission did not direct [it] to monitor the operation of either KTSH or KAZC, nor did [it] otherwise have any independent duty to monitor either station" (Chisholm Trail Opposition, p. 13). Chisholm Trail affirms that it did not know KAZC had commenced operations until Tyler made such disclosure in its October 19, 1998 Comments. Chisholm Trail also says that it discovered that KTSH

had been taken off the air when its engineering consultant visited the KTSH/KAZC tower site on October 24, 1998 (Chisholm Trail Opposition, pp. 13-14).^{1/}

4. Chisholm Trail conveniently overlooks that prior to the filing of its initial response it did in fact make inquiry in Tishomingo as to the service provided by KTSH. Specifically, it attached letters from the President of the Johnston County Chamber of Commerce, the Mayor of Tishomingo, and three local pastors, which in Chisholm Trail's words "demonstrate that KTSH not only serves as a vital source of local news, weather, sports, and informational programming, but also has an important function in local church ministry" (Chisholm Trail October 19, 1998 Response to Order to Show Cause, pp. 4-6). Given these local inquiries, Chisholm Trail, by the exercise of ordinary diligence, should have discovered prior to the filing of its initial response herein that KTSH had suspended operation and KAZC had commenced operation. This is especially so since four of the letters were dated after KAZC had gone on the air and KTSH had gone off the air.

5. Chisholm Trail falsely accuses Tyler of making "ad hominem attacks upon Chisholm Trail's counsel" (Chisholm Trail

^{1/} Tyler has advised the Commission that KTSH resumed operation December 23, 1998.

Opposition, pp. 2, 12). Tyler made no such attack as is manifest by Chisholm Trail's failure to cite any language in Tyler's pleadings which arguably could warrant censure. Rather, Tyler asserted (and Chisholm Trail has not refuted) that it was "scandalous" within the meaning of Section 1.52 of the Rules for Chisholm Trail to claim that (1) Tyler materially misrepresented that Station KTSH went off the air due to "unforeseen circumstances", when Tyler made no such representation, and (2) "the only reason Tyler has filed his Statement [For the Record] is that he needs time to fabricate some plausible explanation -- which undoubtedly will involve lining-up witnesses who are under his influence or control" -- etc.

6. Chisholm Trail's Opposition (pp. 12-20) is long on rationalization and woefully short on any acknowledgment of its misconduct. Certainly, it is insufficient for Chisholm Trail to disclaim with respect to the "unforeseen circumstances" allegation that it "never intended to suggest that such statements had been made by Tyler's FCC counsel on its own" (Chisholm Trail Opposition, p. 19).

7. Tyler did not assert that Chisholm Trail's "scandalous" allegations were directed toward Tyler's FCC counsel. Rather, Tyler understood that the scandalous allegations were directed

against Tyler.^{2/} Chisholm Trail's allegations, which have not been retracted, should be "stricken as sham and false" within the meaning of Section 1.52 of the Rules and, upon referral to the Office of the General Counsel, its attorneys should "... be subjected to appropriate disciplinary action, pursuant to [Section 1.24 of the Rules] for a willful violation ..." of Section 1.52 or for the insertion of "scandalous" matter in its pleadings.

8. Chisholm Trail's offensive conduct is perpetuated in its Opposition. It wrongly asserts that Tyler attempts "to make Mullinax the scape goat" and, having erected this straw man, goes on ad nauseum purportedly to demonstrate that Tyler is responsible for Mullinax' conduct (Chisholm Trail Opposition, pp. 3-12). In its diatribe, Chisholm Trail ignores Tyler's own representations that "I am the party responsible for the action

^{2/} Chisholm Trail says that it "found it incomprehensible that Tyler would need nearly six weeks from the date [Chisholm Trail's] Reply Comments were filed (November 3rd to December 14th) to respond" thereto. Principal counsel for Tyler (Gary S. Smithwick) was in Europe during the period October 22 - November 7, 1998. Principal counsel's father passed away November 24, 1998, and as the only child, he was responsible for funeral arrangements. Co-Counsel (James K. Edmundson) was briefly hospitalized November 13-15, 1998 and his closest friend passed away November 27, 1998. Co-counsel (Arthur V. Belendiuk) was called upon to assist in investigating Chisholm Trail's allegations. Tyler's November 18, 1998 Statement for the Record was not filed, as Chisholm Trail accuses, because he needed "time to fabricate some plausible explanation".

of my employees and I am fully prepared to bear the consequences of their actions" and that --

In making this declaration I am in no way seeking to deflect responsibility for what happened. KTSH is my station and I am the party ultimately responsible for its operation. I should have paid more attention to what was written in the October 1, 1998 letter. I should have been better informed as to the technical state of the KTSH facility. Had I done a better job I could have prevented this problem (Tyler Response, Declaration of Ralph Tyler).

The Commission should disregard Chisholm Trail's scape goat argument as based upon a false premise. It should also reject the following assertions by Chisholm Trail as patently false.

9. First, Chisholm Trail alleges that "Tyler would have the Commission believe" that "Tyler signed the two-sentence letter [of October 1, 1998] without reading it" Tyler did not state that he had not read the letter but rather that he "signed the letter without discussing it with" Mullinax. As noted above, Tyler also acknowledged that he "should have paid more attention to what was written in the October 1, 1998 letter" and "should have been better informed as to the technical state of the KTSH facility."

10. Second, Chisholm Trail alleges that "the record strongly suggests that Mullinax ... was simply paid to take the

blame for Tyler's misrepresentations to the Commission" (Chisholm Trail Opposition, p. 8). As noted above, the record explicitly reflects that Tyler has accepted responsibility for the conduct of both Mullinax and himself. Chisholm Trail's charge that Mullinax "was simply paid to take the blame" is "scandalous" and has no "good ground to support it" within the meaning of Section 1.52 of the Rules. The allegation should be "stricken as sham and false" within the meaning of Section 1.52, and upon referral to the Office of General Counsel, its attorneys should "... be subjected to appropriate disciplinary action, pursuant to [Section 1.24 of the Rules] for a willful violation ..." of Section 1.52 or for the insertion of "scandalous" matter in its Opposition.

11. Third, Chisholm Trail asserts that "Mullinax's explanation concerning his lie to the FCC Field Inspector is a complete fabrication". Chisholm Trail argues that Mullinax did not "panic", but rather that his statements to the FCC Field Inspector "were made deliberately and were part of a scheme to lie to the Commission which began at least one month earlier when KTSH was taken off the air" (Chisholm Trail Opposition, pp. 9-10).

12. Chisholm Trail's assertion is at best argumentative and at worst exceeds the bounds of zealous advocacy.^{3/} Contrary to Chisholm Trail's claim, Mullinax' explanation was forthcoming (Tyler Response, Declaration of Randall C. Mullinax):

When the FCC inspector called I should have advised him of the true situation. Instead I panicked and perpetuated a false statement. I further compounded my mistake by calling the tower crew and the electronics dealer and asking them to verify a story I knew not to be true. I have been employed in the broadcast industry as an engineer for almost thirty years. I have always been a good and conscientious employee and have never had any trouble with the FCC. In this one instance I failed to exercise the good judgment that has served me well during my career. I made a mistake that will never be repeated.

^{3/} Chisholm Trail charges that "Tyler made yet another misrepresentation in this proceeding" purportedly by telling the father of the owner of KTSH's construction permit site that he "would not have FCC approval to build a tower on [the] property until March or April, 1999" (Chisholm Trail Opposition, pp. 16-17 and Exhibit A thereto). Chisholm Trail's hyperbole aside, when Tyler spoke with Finis Hallmark, he (Tyler) certainly understood that the Commission had granted the construction permit which inter alia authorized the relocation of KTSH's technical facilities to Ron Hallmark's property. Because of the pendency of the instant rule making, and the unprecedented campaign orchestrated by Chisholm Trail to torpedo Tyler's proposal, Tyler did not know, however, whether he would relocate KTSH to the authorized site or, upon Commission approval, to a new site serving Tuttle. When speaking with Finis Hallmark, Tyler assumed that the FCC would have issued a ruling in the instant rule making by March or April 1999.

13. Finally, given the state of the record, the Commission may well ask why, having filed a rather benign initial response, Chisholm Trail has become so vociferous in its subsequent pleadings. The reason, upon reflection, is plain. Chisholm Trail has slept on its rights.

14. In its Notice of Proposed Rule Making and Orders to Show Cause, DA98-1682, released August 28, 1998 (Appendix thereto), the Commission expressly invited interested parties to file counterproposals to Tyler's proposal by October 19, 1998. On that date, Chisholm Trail could have filed a mutually exclusive counterproposal that the Commission modify the KXLS(FM) license to specify a C2 operation serving the Oklahoma City area. In particular, and as reflected in the annexed Engineering Statement of William G. Brown, in the absence of KTSH's proposed C3 operation at Tuttle, KXLS(FM) could relocate inter alia to Tuttle or Mustang, Oklahoma, and in Chisholm Trail's own words thereby "achieve the substantial monetary benefit" (Chisholm Trail Opposition, p. 7) of operating in the Oklahoma City area.

15. Tyler does not know why Chisholm Trail chose not to file a counterproposal in this proceeding. Tyler would simply urge that while Chisholm Trail's failure to do so may serve to explain its zealousness, it does not justify the liberties which

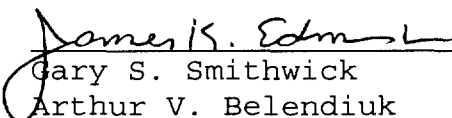
Chisholm Trail has taken with basic fairness and the good faith pleading requirements of the Commission's Rules.^{4/}

16. In sum, the Commission should summarily dismiss or deny Chisholm Trail's objections, reallocate Channel 259C3 from Tishomingo to Tuttle and modify the KTSH license to specify operation thereon.

Respectfully submitted,

RALPH TYLER

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^{4/} Counsel for Tyler, with combined communications experience of 75 years, have never participated in a rulemaking proceeding where a licensee, whose station would be required to change its operating frequency by only one channel, would (at apparent great expense and effort) attempt to disqualify a petitioning station. Chisholm Trail's motive became clear when Tyler's technical consultant determined that the elimination of KTSH from this proceeding would leave Chisholm Trail wide open to move KXLS into the Oklahoma City area.

TECHNIAL COMMENTS
ALLOCATION STUDY FOR KXLS
Potential Reference Points
Channel 259C2 – 50 kW – 150 m HAAT
January 1999

INTRODUCTION

These comments support a reply by Ralph Tyler who has petitioned to have Channel 259C3 moved from Tishomingo to Tuttle, Oklahoma. Tyler is the licensee of KTSH, currently licensed to Tishomingo and has an outstanding Construction Permit (BPH-970220IA) to relocate the KTSH technical facilities. In order to facilitate the move to Tuttle, the FCC proposed to substitute Channel 260C1 for Channel 259C1 at Alva, Oklahoma with KXLS being ordered to Channel 260C1. The Notice of Proposed Rule Making to assign Channel 259C3 to Tuttle was released by the Commission on August 28, 1998. Comments and/or counterproposals were due by October 19, 1998.

Channel 259 proposed for Tuttle is the same channel that is currently assigned to Alva. If it were not for the Tuttle proposal then KXLS could be moved south as a Class C2 facility. From a new site a major portion of Oklahoma City could receive service from KXLS. However, due to the Tyler proposed rule making at Tuttle, KXLS is blocked from moving south. Additionally, if the KTSH Construction Permit were deleted then KXLS could move to a site that would provide greater service to Oklahoma City.

We have shown this information graphically on the enclosed map. We selected a site that would clear all constraints under Section 73.207 (except the Tuttle NPRM). Both sites #1 and #2 will require a city of license change. Site #2 could be licensed to Tuttle, the same community as proposed by Tyler.


Site #1 assumes there is no Tuttle Channel 259C3 allotment . This site is limited from moving further southeast due to the constraint provided by the KTSH-Construction Permit. From Site #1 about 30% of the City of Oklahoma City will receive a 70 dBu or greater service. The remainder of that community will receive 60 dBu or greater service. There are numerous communities inside the 70 dBu contour, e.g. Mustang (1990 population-10,434) that could be selected to receive first local service¹.

Site #2 assumes there is no Tuttle Channel 259C3 allotment and that the KTSH Construction Permit is deleted. The site then could be located south and east closer to Oklahoma City. From this site a maximum Class C2 facility will provide 70 dBu service to more than 75% of Oklahoma City².

As of the October 19, 1998 deadline in the instant docket, Site #1 could have been counter-proposed by the licensee of KXLS.

As proposed by Tyler in the above mentioned rulemaking Channel 259C1 at Alva (KXLS) would be changed to Channel 260C1. Channel 260C1 cannot be moved toward Oklahoma City due to constraints from KATT, Channel 263C and KLUR, Channel 260C1 whether or not Channel 259C3 is allotted to Tuttle.

Bromo Communications, Inc.



William G. Brown
Consultant to Ralph N. Tyler

¹ Reference site for Site #1 is N. Lat. 35° 40' 45", W. Lng. 97° 52' 28"

² Reference site for Site #2 is N. Lat. 35° 33' 47", W. Lng. 97° 50' 32"

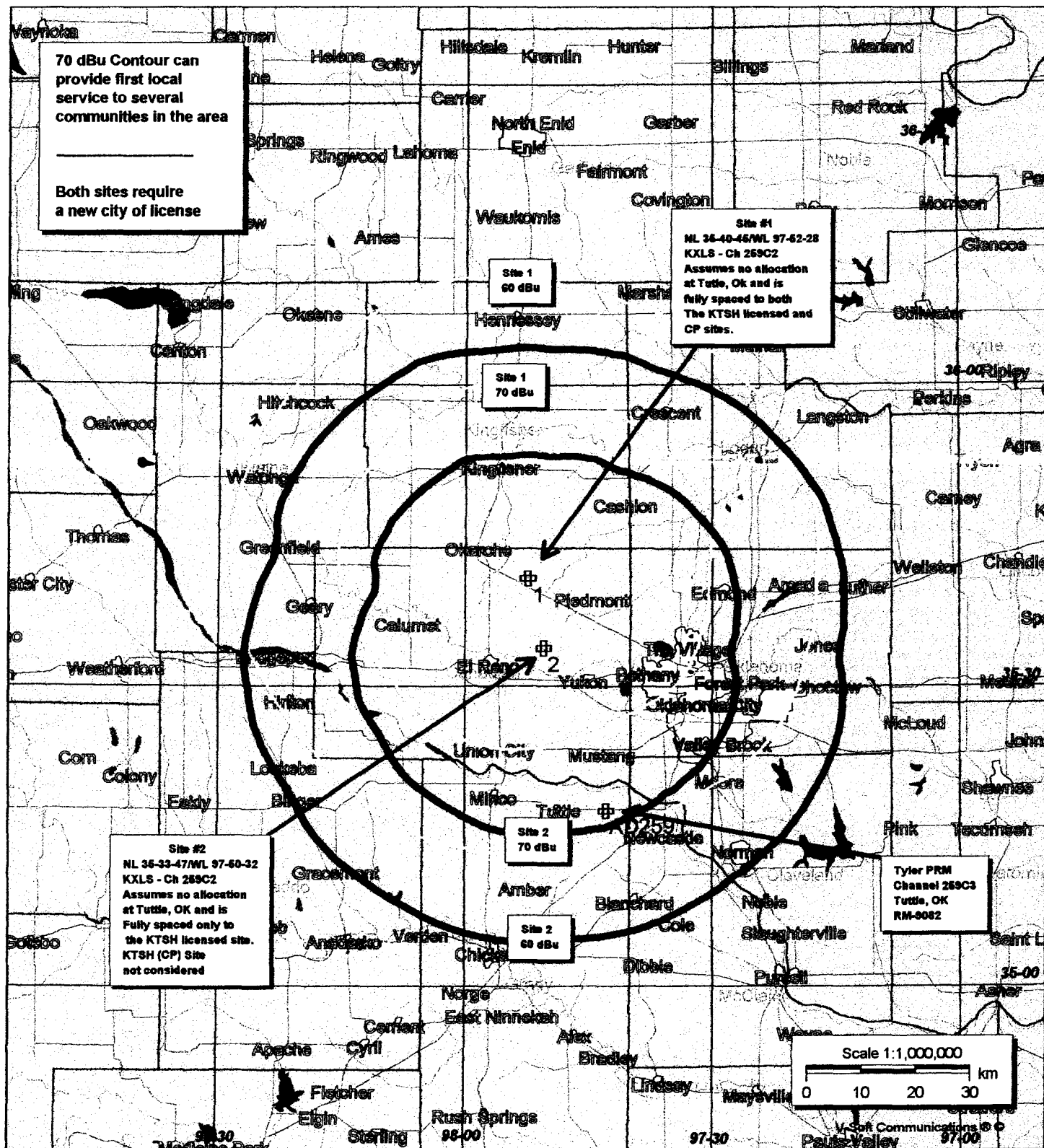


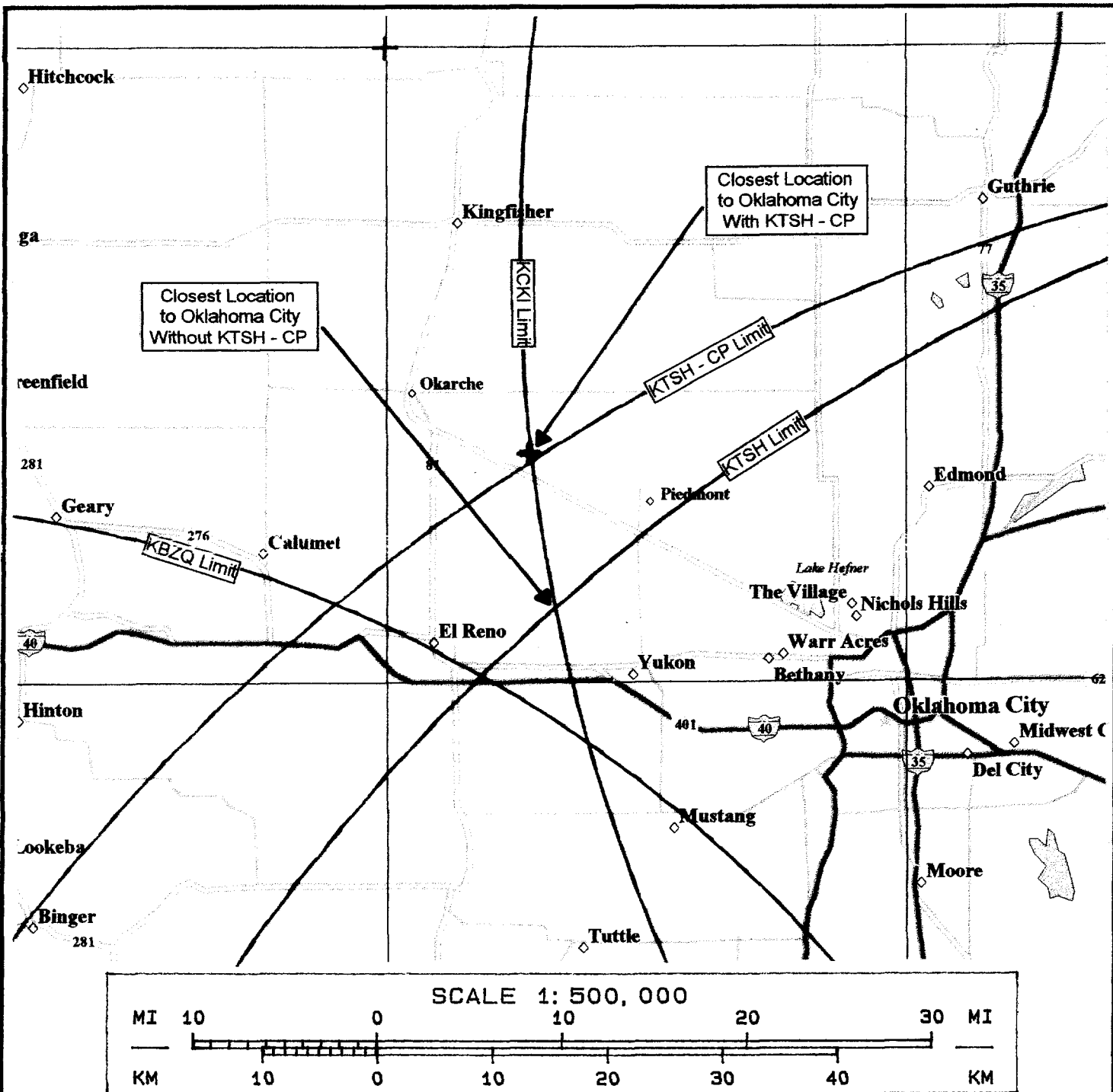
EXHIBIT #1

ALLOCATION STUDY FOR KXLS

POTENTIAL REFERENCE POINT

Channel 259C2 - 50 kW - 150 m HAAT

Bromo Communications, Inc.
January 1999



USABLE AREA STUDY

EXHIBIT #2
USABLE AREA STUDY
KXLS (FM)
 Channel 259C1 - 99.7 mHz
 Alva, Oklahoma
 December 1998

Map is State of Oklahoma
 Scale 1:500,000
 ©1993 DeLorme Mapping

BROMO BROADCAST
 COMMUNICATIONS TECHNICAL CONSULTANTS

CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary in the law offices of Smithwick & Belendiuk, P.C., certify that on the 7th day of January, 1999, copies of the foregoing "Reply to Opposition" were sent via Hand Delivery or First Class Mail, postage prepaid, pursuant to Section 1.4(h) of the Rules, to the following:

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